UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Barbara McCarty, Petitioner,	:	
v.	:	File No. 2:04-CV-321
Vermont State Mental Hospital, Paul Jarris, Commissioner, Vermont Department of Health, Respondents,	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
(Papers 7, 35 and 40)

Petitioner Barbara McCarty, proceeding *pro se*, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, seeking to vacate her involuntary commitment to the Vermont State Hospital. (Paper 7). In her initial petition, McCarty complained that she had been wrongfully committed without sufficient evidence and that the state trial court judge had erred in several rulings. Since filing her petition, McCarty has submitted additional allegations relating to the judge's conduct during the commitment hearing, the effectiveness of her court-appointed attorney, and the evidence being used by the state to justify revoking her parental custody rights.

The challenges raised in the initial petition were

largely presented to the Vermont Supreme Court, which affirmed the lower court's commitment decision. The remaining arguments have not yet been exhausted at the state level. Currently pending before the Court are McCarty's motion for a stay pending exhaustion of her claims (Paper 40) and the respondent's motion for summary judgment (Paper 35). For the reasons set forth below, I recommend that McCarty's motion for a stay be DENIED, that her petition be DISMISSED without prejudice so that she may exhaust her unexhausted claims, and that the pending motion for summary judgment be DENIED as moot.

Factual Background

On April 21, 2004, the State of Vermont charged McCarty with truancy for allegedly failing to send her son to school. When she did not appear for the arraignment, a warrant was issued for her arrest. She was arrested on May 4, 2004, and as a result of her behavior at that time the State added a charge of resisting arrest.

McCarty was released on conditions, but ultimately violated those conditions and was arrested again on September 2, 2004. During this second arrest, she again

resisted. The State subsequently charged her with a second count of resisting arrest and with violating the conditions of her release.

On May 5, 2004, prior to McCarthy's second arrest, the State requested a competency evaluation. The evaluation was conducted by psychiatrist Paul Cotton, M.D. In a state court hearing on October 18, 2004, Dr. Cotton testified that McCarty suffered from mental illness and was not competent to stand trial. Consequently, the state court committed McCarty to the Vermont State Mental Hospital for a period of 90 days and dismissed the criminal charges against her. On October 21, 2004, McCarty appealed her commitment to the Vermont Supreme Court. She filed her habeas corpus petition in this Court on November 22, 2004.

In her appeal to the Vermont Supreme Court, McCarty argued (1) that the evidence did not support her involuntary hospitalization, and (2) that the use of her statements to Dr. Cotton violated her Fifth Amendment privilege against self-incrimination. McCarty also claimed that she did not have sufficient notice that the issue of hospitalization would be addressed at the

October 18, 2004 hearing. In a written opinion dated January 10, 2006, the Vermont Supreme Court affirmed the lower court's ruling.

Currently on appeal at the Vermont Supreme Court is McCarty's challenge with respect to the loss of her parental rights. The respondents report that the Vermont Family Court ruled "Ms. McCarty to be seriously ill and barred her from having any contact with [her] child unless, among other things, she first engaged in treatment for her illness." (Paper 35 at 5) (citations omitted). McCarty has raised issues relating to her loss of parental rights in this habeas corpus proceeding.

Since filing her initial petition, McCarty has supplemented her claims (Paper 37), and the Court has allowed these claims as amendments to her petition (Paper 39 at 1 n.1). Her amendments include an allegation that her attorney failed to make certain arguments during the commitment hearing. She also claims that counsel never discussed his arguments or his strategy with her prior to the hearing, despite her requests that he do so. McCarty further argues that the lower court judge closed the record prematurely, thereby barring her and her attorney

from presenting a "crucial witness" and a written rebuttal. Although she made a similar claim previously, she has recently characterized this latter claim as a due process violation. (Paper 37 at 2). Finally, McCarty reiterates several issues pertaining to her loss of parental rights.

In an order dated July 21, 2006, the Court determined that because her petition now consists of both exhausted and unexhausted claims, it is a "mixed petition" and, as such, subject to dismissal without prejudice. (Paper 39). However, pursuant to Rhines v. Weber, 544 U.S. 269, 276-78 (2005), the Court allowed that McCarty could either strike her unexhausted claims or request that her petition be stayed while she exhausts her remedies in state court. In response to the Court's order, McCarty filed a timely motion for a stay (Paper 40).

Discussion

In Zarvela v. Artuz, 254 F.3d 374 (2d Cir.), cert. denied, 234 U.S. 1015 (2001), the Second Circuit established procedures for the handling of "mixed" habeas petitions. Zarvela held, in part, that a district court

has discretion to dismiss unexhausted claims and stay exhausted claims, so long as the petitioner promptly files her state collateral proceedings and promptly returns to federal court after the conclusion of the state proceedings. See Simms v. Moscicki, 2006 WL 2466811, at *10 n.27 (S.D.N.Y. Aug. 25, 2006) (citing Zarvela, 254 F.3d at 380-82)). After Zarvela, the Supreme Court in Rhines addressed the "mixed petition" issue and reached "a similar, but not identical, result." Id. The Supreme Court held:

> [S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

Rhines, 544 U.S. at 277 (citations omitted).

This Court ruled previously that not all of McCarty's unexhausted claims were plainly meritless. (Paper 39 at 4-5). Therefore, the Court allowed McCarty the opportunity to request a stay pursuant to the Supreme Court's ruling in Rhines. McCarty has accepted the

Court's invitation and moved for a stay, arguing that her claims have merit, and that the state courts have not given her an adequate opportunity to be heard. "The Vermont Supreme Court affirmed everything, apparently without ever viewing my evidence and merits. The Lower Court has blocked filing of viable merits, persisted in permanent misrepresentation of me; I argue there is No conceivable remedy or justice at the State level." (Paper 40 at 2).

As quoted above, the Rhines decision held that a stay should only be granted in limited circumstances. One requirement for a stay is the showing of "good cause." Rhines, 544 U.S. at 278. The Rhines court did not define "good cause," nor has any Court of Appeals to date supplied a definition. See Clendinen v. Under, 2006 WL 2465176, at *3 (S.D.N.Y. Aug. 22, 2006). In Pace v. DiGuglielmo, 125 S. Ct. 1807, 1813-14 (2005), the Supreme Court noted that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." Id. Several lower courts have further determined that "good cause" should arise from external

factors, and not the petitioner's own decisions. See Ramdeo v. Phillips, 2006 WL 297462, at *5-*6 (E.D.N.Y. Feb. 8, 2006) (collecting cases).

Here, McCarty does not argue that she has been confused with respect to the exhaustion issue. Instead, she contends that any further proceedings in state court would be futile since, in her view, those courts will not provide her a fair hearing. Although the actions of the state courts could be viewed as external, the stronger view of McCarty's position is that she has deliberately decided not to pursue state court remedies, based upon her conclusion that those courts will not afford her a "remedy or justice." (Paper 40 at 2).

The belief that a claim will be unsuccessful in state court generally does not excuse the petitioner from exhausting her state court remedies. See Jones v. Keane, 329 F.3d 290, 295 (2d Cir. 2003) ("[T]he fact that the [state court] may have been unlikely to grant habeas relief on his [constitutional claim] does not cure his failure to have raised it in state courts."); Minter v. Beck, 230 F.3d 663, 666 (4th Cir. 2000) (refusing to excuse failure to raise claim in state court, observing

that while effort to obtain state court relief may have been "incapable of producing a successful result, the effort [of raising the claim] was still possible"); Scott v. Mitchell, 209 F.3d 854, 871 (6th Cir. 2000). Consequently, this Court should not conclude that McCarty's failure to exhaust to date, based her belief that it would be fruitless to seek collateral relief in state court, constitutes "good cause" justifying a stay of her petition. The motion for stay should, therefore, be DENIED.

McCarty's direct appeal of her involuntary commitment was decided in January, 2006, and the one-year statute of limitations for filing a federal habeas corpus petition has not yet run. As the Court explained previously, the fact that this habeas corpus petition has been pending since, and indeed prior to, January of 2006 does not halt the running of the one-year statute. See Duncan v. Walker, 533 U.S. 167 (2001). The period will be tolled, however, once McCarty "properly file[s an] application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). McCarty is, therefore, urged to move quickly with the filing of a

collateral motion or petition in state court, and once her claims have been exhausted, to move with similar haste in re-filing her habeas corpus petition in this Court.

Conclusion

For the reasons set forth above, I recommend that McCarty's motion for a stay (Paper 40) be DENIED, and that her petition for a writ of habeas corpus (Paper 7), filed pursuant to 28 U.S.C. § 2254, be DISMISSED without prejudice for lack of exhaustion. I further recommend that the respondents' motion for summary judgment (Paper 35) be DENIED as moot.

Dated at Burlington, in the District of Vermont, this 20th day of September, 2006.

/s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3, 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).